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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 405

BERNARD J. SEMEL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

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Petitioner presents his petition for rehearing of this Court's order dated 11th day of October, 1965, denying the petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit and respectfully prays for a rehearing thereof.

GROUNDS FOR REHEARING

The petition for writ of certiorari was denied without opinion. Petitioner submits that the trial court below erred in denying defendant's motion to vacate the judgment of conviction on the grounds that the District Court for the Eastern District of Virginia was without jurisdiction to entertain petitioner's (defendant's) plea of guilty to Count 10 of the information; and consequently

the trial Court below was without jurisdiction to impose sentence thereon, since the conviction was void. The trial Court below was without jurisdiction to either convict petitioner, or to legally receive his plea of guilty.

Petitioner submits that since the District Court for the Eastern District of Virginia was without jurisdiction to either try petitioner on Count 10 of the information or to receive his plea of guilty thereon, and since the information from its inception was void, petitioner urges that the action of the District Court for the Eastern District of Virginia in imposing sentence upon him was and is a nullity.

That the failure of the trial court below to vacate the judgment of conviction and the imposition of sentence imposed thereon by the District Court for the Eastern District of Virginia has deprived petitioner of his liberty without due process of law and in violation of the Fifth Amendment to the Constitution of the United States; and that sustaining the validity of Count 10 of the information by the Courts below, petitioner's rights under the Sixth Amendment to the Constitution of the United States are violated, since crimes against the United States must be tried in the District in which the alleged offense was allegedly committed.

It is remarkable that in the brief of the Government in opposition to petitioner's petition for writ of certiorari (Opp. 2, 3) it is not contended that the offense ascribed to petitioner in Count 10 of the information was a continuing offense. Petitioner submits that Count 10 of the information referred to an origin and a destination. It is submitted that petitioner's conduct at place of origin was not a violation of Title 18 U.S.C.A. Sect. 836 and was not a violation of law; that the place of destination was Stephens City, Virginia, in the Western District of Virginia. Petitioner submits that transit of fireworks through the Eastern District of Virginia in and of itself,

was not an offense against the law; and thus, if an offense did exist as set forth in Count 10 of the information, venue for the same lay exclusively in the Western District of Virginia at all times and no where else. Thus, a disposition of the charge in Count 10 of the information against petitioner whether by a plea of guilty thereto or by a trial thereon, it is submitted that the same could only have taken place in the Western District of Virginia.

It is respectfully submitted that the failure of the trial Court below to permit petitioner to withdraw his plea of guily after sentence, where he protested his innocence throughout all of the proceedings was error. There was an abuse of discretion by the trial Court below in denying defendant's motion to withdraw his plea of guilty after sentence; and this abuse of discretion by the trial Court below was tantamount to a denial of due process of law under the Fifth and Sixth amendments to the Constitution of the United States. Petitioner urges that this is particularly and peculiarly so, in the case at bar, since there was ample and adequate reason and justification in the record of this case and in the law to grant his motion to withdraw his plea of guilty after sentence and to permit a reinstatement of his plea of not guilty to all of the counts contained in the information with the subsequent order of the trial Court below to direct the case to be tried on its merits.

A reasonably careful review of the record in this case, petitioner contends, clearly reveals that he was, indeed, deprived of his basic and fundamental rights under the Fifth and Sixth Amendments to the Constitution of the United States. The record in this case is replete with evidence supported by unequivocal testimony that petitioner tendered his plea of guilty on September 22, 1964, to the trial Court below through misunderstanding. Petitioner's entry of a plea of guilty through misunderstanding

and inadvertence was made unequivocally clear to the trial Court below by his protestations of innocence as to Count 10 of the information prior to the imposition of sentence on December 8, 1964.

The record is clear that petitioner moved promptly and without delay after sentence on December 8, 1964, to correct his misunderstanding and inadvertance of entering a plea of guilty to Count 10 of the information on September 22, 1964. A fair application of Rule 11 of the Federal Rules of Criminal Procedure by the trial Court below should have caused the Court to hesitate to accept petitioner's plea of guilty as to Count 10 of the information since the record facts show that defendant tendered a plea of guilty, actually through a misunderstanding of the nature of the crime charged in Count 10 of the information. Petitioner urges further that most surely the Court should have *sua sponte* pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure set aside petitioner's plea of guilty prior to sentence on December 8, 1964, after hearing petitioner's testimony before sentence was imposed; and most surely the Court should have vacated petitioner's plea of guilty, since prior to sentence, petitioner's then counsel stated that his client's acts were as consistent with innocence as with guilt. Petitioner urges further, the trial Court below should have vacated his plea of guilty to Count 10 of the information immediately after sentence was imposed since his then counsel apparently asked leave to move to vacate the judgment and sentence.

The record is replete with a showing that after petitioner's plea, but prior to sentence, he repeatedly asserted his innocence. The record is clear that the trial Court should have *sua sponte* invoked the letter and spirit of Rule 32(d) of the Federal Rules of Criminal Procedure at that time, permitting petitioner to withdraw his plea of guilty so as to correct a manifest injustice that at-

tended petitioner's situation, both prior to the imposition of sentence and subsequent thereto.

That at petitioner's hearing on December 15, 1964, on his motion to withdraw his plea of guilty to Count 10 of the information and to vacate the sentence and reinstate the plea of not guilty to the information and have a trial on the merits of the case, the trial Court below should not have hesitated in the slightest degree to have granted this motion in accordance with Rule 32(d) of the Federal Rules of Criminal Procedure.

POINT I

The petitioner raised the issue of jurisdiction of the District Court for the Eastern District of Virginia to accept his plea of guilty to count 10 of the information and thereafter impose sentence thereon upon him by his motion to vacate the judgment, filed December 14, 1964. (Appellant's App. iv, v, 26). The record shows, (bill of particulars) that the offense charged and upon which petitioner was sentenced, was committed in a District other than the one in which the information containing Count 10 thereof was filed. It has been held that crimes against the United States must be tried in the District in which the offense was committed. See *United States* v. *Jacklow*, 1861, 66 U.S. 484, 486; also, Sixth Amendment to the Constitution of the United States, so provides.

It is patently clear that the *locuus delicti* must be determined from the nature of the offense alleged and the location of the so-called criminal act constituting the offense. See *United States* v. *Anderson*, 1946, 328 U.S. 699, 703; 66 S. Ct. 1213, 1216, 90 L. Ed. 1529. The origin of the alleged acts of transportation initiated by petitioner in Brandywine, Maryland, was not in of itself an offense against the law; the destination referred to in Count 10 of the information refers to the Eastern Dis-

trict of Virginia. Petitioner submits that transit of fireworks through the Eastern District of Virginia in and of itself is not an offense against the statute. The destination of the delivery of the fireworks, so far as all of the alleged activities involving petitioner were concerned was to Stephens City, Virginia, in the Western District of Virginia. Consequently, venue to try petitioner for the offense alleged in Count 10 of the information, lay only in the Western District of Virginia. Since proceedings against petitioner could obtain exclusively and only in the Western District of Virginia, it was error for the District Court for the Eastern District of Virginia, either to accept petitioner's plea of guilty or impose sentence upon him thereon after his plea.

Thus in the case at bar, none of the principles of the multi-venue statute, 18 U.S.C.A. Section 3237(a), were applicable where the place of the offense was so clearly set out in the statute itself as it is here. The distinction between a continuing offense and that contemplated by one such as 18 U.S.C.A. Section 836 was clearly drawn by this Court in *United States* v. *Lombardo*, 1916, 241, U.S. 73, 77-78.

Venue should not be made to depend upon the government's inarticulation in drafting the information, since it knowingly allowed petitioner to plead guilty to a void information, based upon a statute in which Congress had so carefully declared the *locus* of the crime.

Therefore, when a place was specifically designated as to where delivery was to be made, prosecution for so making it could lay at that place alone, and no other. See *Travis* v. *United States*, 364 U.S. 631, 636, 81 S. Ct. 358, 361-362, 5 L. Ed. 2d 340. In the case at bar only one single act of delivery was involved for the alleged sale of fireworks; and this delivery alone, in the Western District of Virginia was intended to be penalized under

the statute here. Accordingly, venue lay only in the Western District of Virginia, and the information against and the prosecution of petitioner must originate there and be initiated there. See Sixth Amendment to the Constitution of the United States.

POINT II

Petitioner submits that the failure of the trial court to permit him to withdraw his plea of guilty to Count 10 of the information in the case at bar was an unwarranted abuse of discretion by court below; and this refusal by the trial court below to grant petitioner's efforts and motions to withdraw his said plea of guilty, and to reinstate his plea of not guilty to the information, and allow him to proceed to trial upon the merits of this cause, constituted a denial of Due Process of Law under the Fifth Amendment to the Constitution of the United States.

The record below unequivocally makes it clear that petitioner entered his plea of guilty to Count 10 of the information through a mistake and inadvertence. That the misunderstanding and misapprehension that obtained in the mind of petitioner at the time of entering his plea of guilty to Count 10 of the information on September 22, 1964, was such that Rule 11 of the Federal Rules of Criminal Procedure was hardly complied with in principle. The fact that petitioner was represented by counsel did not relieve the trial court below from requiring strict application and interpretation of Rule 11 at the time of entry of petitioner's plea of guilty. See, *United States* v. *Davis*, 212 F.2d 264, 267, (CA-7), 1954.

Petitioner submits that the trial court below, should have *sua sponte*, set aside his plea, pursuant to Rule 32 (d) of the Federal Rules of Criminal Procedure, on December 8, 1964, and prior to the imposition of sentence upon his previous plea of guilty to Count 10 of the infor-

mation; and most surely, petitioner, urges that even after the imposition of sentence on that day, the trial court below, could have and should have set aside his plea and the sentence imposed thereon when it appeared from both petitioner and his counsel that there was always a misunderstanding and mistake surrounding his original plea of guilty. See *Bergen* v. *United States*, 145 F.2d 181, 188 (CA-8 1944).

Rule 32(d) permits pleas to be withdrawn freely prior to sentence and to correct "manifest injustice" after imposition of sentence. Petitioner submits that the Court's failure on its own motion prior to sentence and then rejecting and denying petitioner's motions after sentence, even more particularly petitioner's motion of December 14, 1964, and after a hearing thereon, was a denial of due process under the Fifth Amendment to the Constitution of the United States. The law favors solicitude for fundamental and essential rights of the accused in considering the matter of guilty pleas; and the Court will grant relief thereon even after sentence has begun. See *United States* v. *Lias*, 173 F.2d 685, 688.

If the petitioner herein is innocent as asserted by him and the record below supports his claims and is not in conflict with his repeated insistence of innocence, due process requires that he be accorded a full trial on the charges against him. Only by granting him a trial can his rights under the Fifth and Sixth Amendments to the Constitution of the United States be secure and "manifest injustice," be corrected, herein.

CONCLUSION

It is respectfully urged that the petition for rehearing be granted and that, upon further consideration, A Writ of Certiorari issue to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

JOSEPH J. LYMAN,
JOSIAH LYMAN,
Attorneys for Petitioner

CERTIFICATE OF COUNSEL

We, Joseph J. Lyman and Josiah Lyman, counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and that it is restricted to the grounds specified in Rule 58, Subdivisions 1 and 2 of the Rules of this Court.

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